

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 305 OF 2017

In the matter of contravention Articles 73, 180 (2) and 10 (2) of the Constitution of Kenya 2010

and

In the matter of contravention of Sections 25 (1) (b) of the Elections Act, 2011

and

In the matter of contravention of Leadership and Integrity Act, Sections 3 (1), 3 (2), 7 (10, 8 and 10

and

In the matter of failure to regard personal integrity, character, competence and suitability in clearance of Independent Candidate for Nyamira Gubernatorial position

Between

Kenneth Gesami Morande.....Petitioner

versus

James Gesami Ondicho.....1st Respondent

Independent Electoral and Boundaries Commission.....2nd Respondent

Ethics and Anti-Corruption Commission.....3rd Respondent

JUDGEMENT

Petitioners case

1. The petitioner questions the suitability of the first Respondent to vie to the Nyamira Gubernatorial seat in the forth coming General Elections and accuses the second Respondent of clearing the first Respondent to vie despite the fact that he did not meet the constitutional and statutory qualifications on integrity. In particular, the petitioner states that the first Respondent was found by a court of law to have misappropriated Constituency Development Funds for West Mugirango Constituency while serving as a member of the national assembly for the said constituency. He claims that the court ordered him to refund the said funds. He also alleges that the first Respondent was engaged in misuse of public funds and also accuses him of failing to pay him for work/ services rendered, i.e. renovating classrooms, construction of pit latrines, gate and furniture.

Firs Respondents Replying Affidavit

2. On record is the Replying Affidavit of the first Respondent filed on 3rd July 2017 stating that that in his capacity as the Member of Parliament for West Mugirango Constituency, he is also the patron of West Mugirango Constituency Fund Committee.

3. He states that the *ex parte* orders issued in High Court J.R. No. **264** of 2010 were set aside. He admits he was charged in CMCR No 354 of 2011, but was acquitted on 31st August 2012. He annexed the ruling to his affidavit.

4. He denies ever withdrawn money from the C.D.F., but he admits having transferred to the C.D.F. a sum of **Ksh. 1,050,000/=** to avoid unnecessary wrangles. However, upon reflection, and after legal advice he demanded the said sum back and proceeded to sue the CDF Board in court in Milimani SRMCC No. **45** of 2013. The case was dismissed, but his appeal against the dismissal is pending in court.[\[1\]](#)

5. He also states that the issues were determined in Pet. No. 573 of 2012, hence, the matter is *res judicata*.

6. Regarding the alleged failure by the petitioner to be paid for the alleged services, he avers that there was delay in payment, hence opted to pay from his pocket, a common practice by members of Parliament.

7. He also avers that the petition is misconceived and having been acquitted as aforesaid, the issue cannot be raised. Further, no complaint has been lodged under the Leadership and Integrity Act[\[2\]](#) and that the Responsibility for clearing candidates is vested with the second Respondent.

The second Respondents Replying Affidavit

8. On record is the affidavit of **Douglas Bargoret** filed on 5th July 2017. He states that the integrity matters raised in this case were never raised before the first Respondent was cleared and that the matters referred to are insufficient to disqualify the first Respondent from contesting the said seat.

Petitioners Advocates submissions

9. Counsel conceded that the I.E.B.C. is mandated to hear matters relating to nominations and correctly cited the decision in *International Centre for Policy and Conflict & 5 Others vs The Hon. Attorney General & 4 Others*[\[3\]](#) but nevertheless argued that this court has jurisdiction to hear and determine this matter and that the issues raised in this petition are not *res judicata*.

10. Counsel also submitted that the second Respondent did not correctly apply the compulsory requirements and qualifications set out in article 180 (2) and 73 of the constitution and concluded that the petitioner is entitled to the reliefs sought.

First Respondents Advocates' submissions

11. Counsel questioned the jurisdiction of this court in matters relating to chapter six of the constitution and in particular cited section **42 (2)** of the Leadership & Integrity Act[\[4\]](#) which provides that the complaint be lodged with the relevant body.

12. Counsel insisted that the mandate of determining nominations belongs to the I.E.B.C. under Article **88 (4) (e)** of the constitution, Section **74** of the Elections Act[\[5\]](#) and Section **4 (e)** of the **I.E.B.C. Act**.[\[6\]](#) Counsel relied on several court decisions whereby it has been held that where the constitution or statute has established a dispute resolution mechanism, the same ought to be followed and reiterated that the petitioner has not demonstrated that I.E.B.C. infringed its statutory mandate.

13. Counsel also submitted that this petition is *res judicata* since the issues relied upon were determined by a court of competent jurisdiction and urged the court to dismiss the petition.

14. Counsel for the second and third Respondents adopted the submissions by the first Respondent.

On the issue of Jurisdiction

15. A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in

the matter of the Interim Independent Electoral Commission,[7] stated that " Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent." Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[8]

16. It is not disputed that the issue before the court relates to nominations. Petitioners counsel admitted this and urged the court to entertain the petition by virtue of its wide powers conferred by the constitution.

17. The relevant provisions which vest the I.E,BC. with powers to determine nomination disputes are Article **88 (4) (e)** of the constitution, Section **4 (e)** of the Independent Electoral and Boundaries Commission Act[9] and Section **74** of the Elections Act.[10] The said provisions are reproduced below.

18. Article **88 (4) (e)** of the constitution provides that:-

(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

19. Flowing from the above provisions is section **4 (e)** of the Independent and Electoral Boundaries Commission Act[11]provides as follows:-

4. Functions of the Commission

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for —

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;

20. The above provisions are replicated in section **74 (1)** of the Elections Act[12]which provides that:-

74. Settlement of certain disputes

(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

21. In the words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-[13]

“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

22. Whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed. Indeed, in the case of the *Speaker of the National Assembly vs Karume*. [14] the Court stated:-

“...Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed....”

23. The court of appeal [15] discussing the same subject reiterated as follows:-

“.....This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes.” *Speaker of the National Assembly v. Karume (supra)*

24. In *Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others* [16] it was held that :-

“.....where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

25. The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, *including* reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “*including*” leaves no doubt that Article 159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. [17]

26. As stated above, the dispute before this court relates to nominations. The petitioner did not challenge the nominations before the I.E.B.C. dispute Resolution committee., thereby ignoring the laid down mechanism. In my view, the petitioner ought to have utilized the mechanism provided under the above provisions before approaching the High court.

27. I find backing in the above cited provisions of the law, the cited cases and also in the decision rendered in *Boniface Mwangi vs Resident Magistrates Court, Milimani & 2 Others* [18] where it was held that to convert every issue into a constitutional issue is to undermine the importance of the process. Also relevant is the decision rendered in *Peter Ochara Anam & 3 Others vs CDFB & 3 Others* [19] where it was held that the constitution was not meant to replace statutes that provide remedies to those concerned. Consequently, I find that the preliminary objection succeeds.

28. Also on statutory laid down mechanism, Section 42 (1) of the Leadership and Integrity Act [20] provides that “A person who alleges that a State officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint.”

29. Further, section 43(1) of the Leadership and Integrity Act [21] provides that “If upon investigation under this Part, the public entity is of the opinion that civil or criminal proceedings ought to be preferred against the respective State officer, the public entity shall refer the matter to—

(a) the Commission or the Attorney-General, with respect to civil matters;

(b) the Director of Public Prosecutions, with respect to criminal matters; or

(c) any other appropriate authority.

30. The wording of section 43(1) cited above is clear. It reads "If upon investigation under this Part, the public entity is of the opinion that civil or criminal proceedings ought to be preferred against the respective State officer." It has not been shown that the third Respondent investigated the matter and it is not clear on what basis they have been sued since the petitioner never reported the matter to them. In fact, the petition as drawn does not disclose any cause of action against the third Respondent.

31. I hold and find that the petitioner ought to have utilized the statutorily laid down mechanisms instead of the approaching the court. On the question of nominations, he ought to have raised the issue with the I.E.B.C. On the integrity issues, he ought to abide by the above provisions. On these two grounds, I am inclined to decline jurisdiction as I hereby do and dismiss this petition.

32. Prayers 6, 7, 8 of the petition are judicial review in nature. This raises the issue of whether or not the petition meets the *threshold for granting Judicial Review orders*. *Judicial Review orders* can be availed only to stop, quash, remove, adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of *quasi-judicial* functions by administrative bodies or other authorities or persons obliged to exercise such functions.

33. Atkin, L.J. thus summed up the law on this point in *Rex v. Electricity Commissioners*^[22]

"Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

34. It is important to point out that in granting a writ of *certiorari* the superior court does not exercise the powers of an **appellate** tribunal. It does *not review* or *reweigh* the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person.^[23]

35. The supervision of the superior court exercised through writs of '*certiorari*' goes on two points, as has been expressed by Lord Sumner in *King vs. Nat Bell Liquors Limited*.^[24] One is the area of inferior *jurisdiction* and the *qualifications and conditions* of its exercise; the other is the *observance of law in the course of its exercise*. These two heads normally cover all the grounds on which a writ of '*certiorari*' could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

36. Judicial review is a form of court proceeding, in which the judge reviews the lawfulness of a decision or action, or a failure to act, by a public body exercising a public function. It is only available where there is no other effective means of challenge.

37. Judicial review is concerned with whether the law has been correctly applied, and the right procedures have been followed. In order to succeed the claimant will need to show that either: A public body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so.

38. Broadly, in order to succeed, the applicant will need to show either:-

a. *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*

b. *a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

39. No material has been presented before me to warrant the issuance of orders of judicial review.

40. The next issue is whether the petitioner has demonstrated that the first Respondent breached the chapter on integrity, hence unqualified to contest. The first Respondent did annex a court ruling rendered in Criminal Case number **354** of 2011 showing that he was cleared of the criminal charges and acquitted under section **210** of the Penal Code.^[25] That being so, I find no merit in the petitioners arguments casting aspersions on the first Respondent.

41. The upshot is that the petitioners allegations are baseless, shallow and in my view mere vendetta and the court is unable to attach any weight on them.

42. Consequently, this petition is one for dismissal. I therefore dismiss this petition with costs to the Respondents.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this **26th** day of **July**, 2017

John M. Mativo

Judge

^[1] High Court Civil Appeal No. 123 of 2017

^[2] Act No. 24 of 2011

^[3] {2013}eKLR

^[4] Act No. 24 of 2011

^[5] Act No. 24 of 2011

^[6] Act No. 9 of 2011

^[7] Constitutional Application No. 2 of 2011 (unreported)

^[8] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

^[9] Act No 9 of 2011

^[10] Act No 24 of 2011

^[11] Act No. 9 of 2011

^[12] Act No. 24 of 2011

^[13] 19 U.S. 264 (1821)

^[14] {2008} 1KLR 425

^[15] In the case of **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another** {2015}eKLR

^[16] {2008} 3 KLR (ER) 296).

^[17] Ibid

[18] {2015}eKLR

[19] {2011}eKLR

[20] Supra

[21] Supra

[22] 1924-1 KB 171 at p.205 (C)

[23] Per Lord Cairns in – ‘Walsall’s Overseers v. L. & N. W.Rly. Co (1879) 4 AC 30 at p. 39 (D)

[24] (1922) 2 AC 128 at p. 156 (E)

[25] Cap 63, Laws of Kenya